Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

Wayne King,

Petitioner,

v.

Charles Beavers,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The United States Court of Appeals for the Eighth Circuit held that Petitioner had not shown that he was deprived of a federal constitutional right. The question presented:

WHETHER OR NOT A PERSON IS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WHEN HE IS FORCIBLY REMOVED FROM HIS HOME BY A DEPUTY SHERIFF UNDER THE AUTHORITY OF AN INVALID GUARDIANSHIP ORDER.

II. The United States Court of Appeals for the Eighth Circuit held that Respondent was entitled to qualified immunity. The question presented:

WHETHER A COUNTY DEPUTY SHERIFF IS ENTITLED TO QUALIFIED IMMUNITY WHEN HE REMOVES SOMEONE OUT OF HIS HOME AND THEN CONTINUES TO HOLD THAT PERSON IN CUSTODY AND TAKE HIM OUT OF THE DEPUTY'S JURISDICTION AND THEN OUT OF THE STATE.

III. The United States Court of Appeals for the Eighth Circuit found almost all of the facts in a light most favorable to the Respondent. The question presented:

HAS THE EIGHTH CIRCUIT CHANGED THE STANDARD OF REVIEW FOR PRETRIAL QUALIFIED IMMUNITY MOTIONS BY ACCEPTING AS TRUE THE FACTS ALLEGED BY THE RESPONDENT AS OPPOSED TO THOSE ALLEGED BY THE PETITIONER?

LIST OF PARTIES

Wayne King, Plaintiff/Petitioner

Charles Beavers, Defendant/Respondent

Marilyn Johnson, Defendant

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Wayne King, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit granting qualified immunity to the respondent, Charles Beavers.

Opinions Below

The United States District Court for the Western District of Arkansas, Fort Smith Division,

denied Respondent's motion for summary judgment on the basis of qualified immunity. *King v. Johnson and Beavers* (U. S. District Court, Western District of Arkansas, Fort Smith Division No. 96-2219, August 1, 1997). Respondent took an immediate appeal which was decided by the United States Court of Appeals for the Eighth Circuit on July 9, 1998. *King v. Beavers,* 148 F.3d 1031 (8th Cir. 1998). The Eighth Circuit reversed the District Court.

Prior to the Eighth Circuit's decision, Marilyn Johnson filed a motion for summary judgment which was decided on May 4, 1998. The District Court held that Johnson was entitled to summary judgment based on a good faith defense. *King v. Johnson and Beavers* (U.S. District Court, Western District of Arkansas, Fort Smith Division No. 96-2219, May 4, 1998). Petitioner has appealed the grant of summary judgment to Marilyn Johnson to the U. S. Court of Appeals for the Eighth Circuit. The appeal is still pending. To this date, to counsel's knowledge, neither District Court opinion has been published.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on July 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of these provisions are found in the Appendix.

U. S. Const. Amend. IV

U. S. Const. Amend XIV §1

Ark. Code Ann. §28-65-212

Ark. Code Ann. §28-65-213(e)

STATEMENT OF THE CASE

Wayne King (hereinafter "Wayne" or "King"), Petitioner, filed his complaint against Marilyn Johnson and Charles Beavers, Respondent, alleging that they had violated 42 U.S.C.A. §§1983 and 1988, falsely imprisoned him and committed outrageous conduct against him. The complaint was filed in the U. S. District Court for the Western District of Arkansas, Fort Smith Division. Jurisdiction was based on 28 U.S.C.A. §§1331, 1343 and 1367. Beavers and Marilyn both answered. Beavers filed a motion for summary judgment on the ground of qualified immunity. Wayne filed a timely response. On August 1, 1997, the District Court denied Beavers' motion on the ground that he was not entitled to qualified immunity. The District Court stayed the case so that Beavers could appeal immediately. On July 9, 1998, the U. S. Court of Appeals for the Eighth Circuit reversed the District Court and granted qualified immunity. *See, King v. Beavers,* 148 F.3d 1031 (8th Cir. 1998); (2-A–12-A). On May 4, 1998, the District Court granted summary judgment to Marilyn Johnson on the basis of a good faith defense. (33-A–76-A).

In 1995, Wayne, then 77 years old, lived in Clarksville, Arkansas with his wife, Bonnie King. Bonnie had for many years had health problems due to the removal of her parathyroid glands in 1947 and dementia. Wayne had been responsible for taking care of her since 1947 because of her parathyroids. Wayne and Bonnie had lived in

California, where Wayne had worked in the highway department. They had one daughter, Marilyn, who did not, and still does not, get along with her father.

After Wayne retired, he and Bonnie moved to Arkansas in 1984. Lela King, Wayne's mother, is 96 years old and lives with Wayne's brother, Claud, who resides in Fort Smith, Arkansas. Clarksville is approximately 65 miles from Fort Smith. From the time that Wayne and Bonnie moved to Arkansas until they were taken back to California, Johnson visited them three times, including the time at issue here.

On October 30, 1995, Betty Tudor, a social worker for the Arkansas Department of Human Services, Adult Protective Services, apparently contacted Marilyn about her parents. Bonnie at the time suffered from dementia. Wayne had some health workers who assisted him in taking care of her, but they did not get along with Wayne. These nurses then reported Wayne to Tudor, who called Marilyn.

The basis for Tudor's concern was that she felt it was dangerous for a couple in their seventies to take a nap in the dark in the afternoon. On one occasion, she went to their house. When they did not respond immediately she let herself in and found them in bed in the middle of the afternoon. She feared for Bonnie's condition but found her to be all right. Wayne would take naps in the afternoon, but he would often be up late taking care of Bonnie and would need some rest.

However, Tudor believed that Wayne was a threat to himself and Bonnie. She called Wayne's sister in California, Pauline Buffington, and Marilyn, who was also in California. Pauline at first was to go to Arkansas on November 6, 1995. However, Marilyn's husband, Steve, stated that "they did not want war" and told Pauline that Marilyn would fly to Arkansas. Marilyn then flew to Arkansas on November 10, 1995. During this time, Marilyn began to plot with Tudor how to obtain a guardianship over her parents.

Tudor told Marilyn that if she did not get a guardianship that the State would. However, Tudor had told Pauline Buffington that Bonnie should stay at home. Marilyn enlisted the services of Bruce Wilson, the Deputy Prosecuting Attorney for Johnson County, Arkansas, which is where Clarksville is located. Even though he is a Deputy Prosecutor, Wilson is allowed to maintain a private law practice.

Without consulting any other family members, on November 17, 1995, a petition for guardianship was filed on Marilyn's behalf by Wilson. Wayne and Bonnie were never served with the Petition or the notice that a hearing was to be held on November 21, 1995. On November 21, a hearing was held to determine whether or not to grant Marilyn guardianship over her parents. Wayne and Bonnie were not present because they had not been given notice of the hearing.

Marilyn presented as evidence an unsworn letter from Dr. Patterson, who had not treated

Wayne since 1993, which stated that Wayne was perhaps a threat to himself and his wife. This violated Arkansas law in two different ways. First, the letter was not sworn, which made it inadmissible, and second, the letter did not provide clear and convincing evidence that Wayne or Bonnie was incompetent. *See,* Ark. Code Ann. §28-65-212 and 213(b); *In re Bailey,* 299 Ark. 352, 771 S.W.2d 779 (1989). Despite the fact that neither Wayne nor Bonnie was present, that the medical testimony was unsworn and that it did not meet the clear-and-convincing burden of proof, the Johnson County Probate Court issued an Order and Letters of Guardianship to Marilyn. She also utilized the temporary guardianship procedure to obtain a permanent guardianship. *See,* Ark. Code Ann. §28-65-218.

Marilyn was not physically capable of being a guardian. At first, Marilyn could not go to Arkansas because of her health problems. In recent history, Marilyn has had two seizures, which forced her to quit her job. She also cannot drive a car and has problems with her back.

Wayne on the other hand had taken care of Bonnie for nearly 50 years. It was Wayne who arranged for meals to be delivered to the house, and he usually supplemented them. The house was well taken care of and clean. Wayne made sure that Bonnie had appropriate undergarments for her incontinence. In contrast to Marilyn's inability to drive, Wayne was a good driver and would drive to Fort Smith to see the doctor. He would also take Bonnie to have her hair done.

Marilyn decided that, even though her parents owned a home in Clarksville and had family in nearby Fort Smith, she should take them to California. Marilyn, without any warning to Wayne and Bonnie and having never told anyone in the family about the guardianship, moved them to California on November 29, 1995.

To move them, Marilyn again enlisted the aid of Betty Tudor. Wayne, however, refused to get out of his bed and refused to go to California. Marilyn and Tudor then called on Charles Beavers to help them remove Wayne and Bonnie from their home. Beavers arrived in his patrol car and at first tried to talk Wayne into leaving, but Wayne refused. Beavers then called Wilson in his capacity as Deputy Prosecuting Attorney for Johnson County. Wilson told Beavers that Wayne must go with Marilyn. After further unsuccessful attempts to coax Wayne into leaving, Beavers apparently called Wilson again. Wilson instructed Beavers that, if Wayne would not get out of bed, to remove him physically.

Beavers, despite Wayne's protests, picked Wayne up out of his bed and carried Wayne to Beavers' patrol car. Along the way, he bumped Wayne into a bathroom-door facing, injuring Wayne's back and side. To this day, Wayne still has problems with his back. Beavers put Wayne into the back set of the patrol car behind the partition like he would an arrested suspect. Wayne never gave his permission to be taken out of the house to Beavers or Marilyn. Wayne was not even

allowed to change clothes. He was taken in his pajamas.

Wayne and Bonnie were separated. Marilyn took Bonnie in her vehicle, and Beavers took Wayne in his patrol car. Marilyn directed Beavers to take Wayne to the Clarksville Medical Group offices. She followed with Bonnie. When Beavers arrived at the Clarksville Medical Group with Wayne, a nurse came from the back door of the clinic and administered some kind of injection to Wayne as he sat in the car.

Wayne and Bonnie were then taken to the Little Rock airport. At some point, Beavers was told by Sheriff Nicklas that it was permissible for him to go to Little Rock and then on to California. Wilson also advised Beavers that he could go to Little Rock. It was determined that Beavers would go all the way to California as long as Johnson County was not responsible for the expenses.

When the four of them arrived at Little Rock, Wayne was finally allowed to put on socks and shoes, but he was still in his pajamas. While at the Little Rock airport, Wayne was escorted at all times by Beavers. He was kept separate and apart from his wife, who was escorted by Marilyn. Beavers escorted Wayne onto the plane. Beavers remained seated next to Wayne at all times for the duration of the trip. Wayne did not converse with Beavers on the flight. They flew from Little Rock to Dallas, Texas, where connections were made to San Jose, California. In the Dallas airport, Wayne was again kept separated from his wife. He was

escorted by Beavers, and Bonnie was escorted by Marilyn On the flight to San Jose, Beavers again sat next to Wayne. Upon arriving at the San Jose airport, Beavers escorted Wayne off the plane, whereupon he was paid $430 in cash.

In California, Wayne and Bonnie initially stayed at Marilyn's house, which sits in a remote area on about 40 acres. It is fenced in. However, Bonnie then went into the hospital and then to a nursing home where she died March 31, 1996. Wayne remained in Marilyn's house, essentially a prisoner. He was not allowed to answer the phone, and Marilyn kept tabs on whom Wayne talked to. Wayne was perfectly capable of taking care of himself and was not a suicide threat as alleged by Marilyn. Wayne prepared his own meals in California and made sure he had clean clothes. Marilyn, however, still spoke negatively about her father. She attempted to obtain a conservatorship over Wayne in California. She and her California attorney tried to convince Lisa Morello, one of the persons whom Marilyn hired to watch Wayne, to testify untruthfully at the California conservatorship hearing. Morello refused. At that hearing, the court-appointed expert stated in her report that Wayne was perfectly competent, and the judge refused to appoint a conservator. The expert determined that Wayne was a man of strong opinions and great ability to think and act in his own best interests. Wayne was present at the California hearing. Only at that point did Marilyn agree to dismiss her petitions in California and Arkansas. Wayne returned home to Clarksville.

In the meantime, Marilyn continued to be a conservator over Bonnie and kept her in a California nursing home. Bonnie died in California and was buried there. The expert in the California conservatorship hearing had stated that Wayne should have a say in Bonnie's care. However, Marilyn buried Bonnie in California, even though Wayne was in Arkansas.

REASONS FOR GRANTING THE PETITION

I. This case presents an important question as to whether a person is deprived of his constitutional rights under the Fourth and Fourteenth Amendments when he is forcibly removed from his home under the authority of an invalid court order.

The Fourth Amendment states that "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U. S. Const. Amend. IV. The United States Supreme Court has already recognized that

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 898. The Fourth Amendment protects people, not just places. *Terry,* 20 L.Ed.2d at 899. Furthermore, it protects "the people," not just the criminally charged. *Cofield v. Randolph County Com.,* 90 F.3d 468, 472 (11th Cir. 1996) (Goodwin, Senior Circuit Judge, dissenting).

The Fourth Amendment is not a trial right, but it affords protection against governmental in-

trusion into one's home and affairs to all citizens. *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305, 318 (1986). The Fourth Amendment's protection applies in the civil context as well. *Soldal v. Cook County,* 506 U.S. 56, 67, 113 S.Ct. 538, 121 L.Ed.2d. 450, 462 (1992). The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. *Kimmelman,* 91 L.Ed.2d at 318. In order to prevail, the plaintiff need only prove that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. *Id.*

The Fourth Amendment is a primary source of constitutional protection against physically abusive government conduct. *Gardner v. Buerger,* 82 F.3d 248, 251 (8th Cir. 1996) (citing *Graham v. Conner,* 490 U.S. 386, 394, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989)). For Fourth Amendment purposes, a police officer seizes a person when by physical force or show of authority he limits that person's liberty. *Id.* (citing *California v. Hodari D.,* 499 U.S. 621, 625-26, 111 S.Ct. 1547, 1550-51, 113 L.Ed.2d 690 (1991)). In a Fourth Amendment case, what matters is the intrusion on the people's security from governmental interference. *Soldal,* 506 U.S. at 69, 121 L.Ed.2d at 463. The U. S. Supreme Court has held that seizures of property are subject to Fourth Amendment scrutiny even though no search within the Fourth Amendment has taken place. *Id.*

Petitioner has alleged a violation of the Fourth Amendment, and the Eighth Circuit has erred in holding that he has not. The Eighth Circuit's holding conflicts with the Court's decision in *Soldal,* in which a person's mobile home was illegal seized by a deputy sheriff. 121 L.Ed. at 458. In this case, Petitioner's home has not been seized, but his very person. The guardianship order on which Respondent relied, though appearing facially correct, was invalid and did not give Marilyn Johnson authority to take King into custody, let alone Beavers. It was on the authority of that order that Beavers seized King against his will and physically carried him out of his home, injuring his back. Beavers then transported King out of Beavers' jurisdiction to Little Rock, Arkansas and then, still using his authority as a Johnson County deputy sheriff, took Wayne on an airplane which traveled from Little Rock, Arkansas to Dallas, Texas to San Jose, California. Even if the guardianship order and letters were valid, they still did not grant any authority to a Johnson County deputy sheriff to act. They only gave custody and control to Marilyn Johnson, not Charles Beavers.

Below, Beavers attempted to compare the guardianship order and letters to an arrest warrant. It is not an appropriate analogy. An arrest warrant is specifically directed to a law-enforcement officer and commands him to arrest a person. When an officer receives an arrest warrant, the face of the warrant tells the officer that a judge has reviewed all of the supporting materials and believes there is probable cause for the officer

to arrest the person named in the warrant. The letters and order in this case do not command Beavers to arrest or seize King. The face of the order only gives Marilyn Johnson authority to act, not Beavers.

In *Hurlman v. Rice,* a mother was temporarily restrained by a family court from residing with her minor child's grandfather, her father. 927 F.2d 74 (2d Cir. 1991). The mother disobeyed the order, and the child's father, a police officer, contacted some of his friend who were state troopers. *Id.* The troopers entered the home without the mother's or grandfather's permission and took the child. *Id.* In that case, the Second Circuit found that the Fourth Amendment applied. *Id.* (Citing *Payton v. New York,* 445 U.S. 573, 584-90, 100 S.Ct. 1371, 1378-82, 63 L.Ed.2d 629 (1980)). In this case, the Eighth Circuit has found that the Fourth Amendment does not apply in a guardianship proceeding when the proposed ward is seized against his will by a deputy sheriff without any authority. *King,* 148 F.3d at 1034, n. 3). The Eighth Circuit's decision in this case is in conflict with the Second Circuit's decision in *Hurlman.* Furthermore, the Eighth Circuit's decision is in conflict with this Court's previous decisions holding that the Fourth Amendment protects people and not just items or privacy. If the Fourth Amendment applies when a person's mobile home is physically seized and towed to a different lot (*See, Soldal,* 121 L.Ed. at 462), surely the Fourth Amendment applies when an individual's very "person" is seized by a government official and transported to another state.

The Eighth Circuit held that King had not pled that there was a violation of the Fourth Amendment. In *Soldal,* the complaint alleged that the deputy sheriffs acting under color of state law dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot. 121 L.Ed.2d at 465. This Court held that those facts, as alleged, sufficed to constitute a "seizure" within the meaning of the Fourth Amendment. *Id.* In this case, King has alleged that Beavers took him out of his home under color of law and transported him across several states against his will without proper authority. Those facts, when construed in the light most favorable to King (as they must be in a motion for summary judgment), constitute a seizure within the meaning of the Fourth Amendment.

The Eighth Circuit did not find that this was a Fourth Amendment case but did analyze this under the Fourteenth Amendment. The Eighth Circuit analysis was flawed for not analyzing under the Fourth Amendment because:

> Where a particular amendment provides an explicit textural source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.

County of Sacramento v. Lewis, __ U.S. __, 140 L.Ed.2d 1045, 1055 (1998). A seizure occurs only

when there is governmental termination of freedom of movement through means intentionally applied. *Lewis,* 140 L.Ed.2d at 1056. In this case, Beavers intentionally removed King from his bed in his pajamas and took him to California. That constitutes a seizure under the Fourth Amendment. However, even under the Fourteenth Amendment analysis, there is a deprivation of a federal constitutional right.

The term "due process" under the Fourteenth Amendment was meant to secure individuals from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Lewis,* 140 L.Ed.2d at 1057 (citing *Hurtado v. California,* 110 U.S. 516, 527, 4 S.Ct. 111, 28 L.Ed.232 (1884)). The touchstone of "due process" is protection of the individual against arbitrary action of the government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. *Lewis,* 140 L.Ed.2d at 1057. The "due process" clause was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *Id.* This Court has held that the cognizable level of executive abuse of power is that which "shocks the conscience." *Lewis,* 140 L.Ed.2d at 1057. For example, the forced pumping of a suspect's stomach "shocked the conscience" and violated the decencies of civilized conduct. *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

In this case, Beavers has arbitrarily removed King from his home against his will. There was no court order authorizing Beavers to take any action. The Eighth Circuit held that what King was actually pleading was that there was a Fourteenth Amendment requirement that Beavers obtain a second court order. *See, King v. Beavers,* 148 F.3d 1031, 1034 (1998). The Eighth Circuit has misconstrued the allegations. That sort of analysis is best applied in deciding whether or not Beavers acted as a reasonable officer would have.

The Eighth Circuit opinion has combined the two analyses of what constitutional right is at stake and what a reasonable officer would do. The Eighth Circuit has essentially held that whether or not there is a Fourteenth Amendment right depends on what a reasonable officer would have done. *See, King,* 148 F.3d at 1034. The Eighth Circuit held that, since a reasonable officer would not have waited for a second court order, then there is no Fourteenth Amendment right at stake. *See, id.* at 1034-35.

That is not the correct analysis under the Fourteenth Amendment. As this Court recently stated, the first step is to identify the exact contours of the underlying right said to have been violated. *Lewis,* 140 L.Ed.2d at 1054, n. 5. The right which must be defined is whether or not a person may not be removed from his home against his will by a deputy sheriff under the authority of a guardianship order that is invalid and on its face does not direct the deputy sheriff to act. Removing someone from his home against his will and with-

out any authority is certainly arbitrary and oppressive. The Eighth Circuit makes much of the fact that below Petitioner did not fully argue his claims under the Fourth and Fourteenth Amendments. However, Beavers never raised those issues below, and King did not need to respond. Respondent's motion for summary judgment at the district court was based solely on the fact that he had acted reasonably under a qualified-immunity analysis.

The Johnson County Probate Court's order was invalid because many of the Arkansas statutes regarding guardianships were violated. King's rights under the Fourth and Fourteenth Amendments were violated, and the Eighth Circuit has erred in holding that the Fourth Amendment did not apply and that King's Fourteenth Amendment rights were not violated.

II. This case is also important because a state actor should not be given qualified immunity when he unreasonably removes someone from his home and then takes him out of his jurisdiction and then out of the state.

Government officials performing discretionary functions generally are shielded from liability for civil damages only if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, 410 (1982). Whether an official may be personally held liable

for an allegedly unlawful official action turns on the objective legal reasonableness of the action taken. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Following the advice of counsel does not automatically cloak an official with qualified immunity. *E-Z Mart Stores v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1989). In *Hurlman v. Rice,* qualified immunity was not given to state troopers who entered a home and removed a child based on an order from a family court which temporarily restrained the minor child from living with his grandfather. 927 F.2d at 80-82. The Second Circuit held that the state troopers could not have objectively viewed the family court's order as giving them blanket permission to enter the grandfather's house to retrieve a child and deliver custody to the father. *Hurlman,* 927 F.2d at 80. Just as the order in *Hurlman* did not direct the officers to take any action, the guardianship order and letters in this case did not direct Beavers to take any action.

An expert has also opined that no reasonable officer would have taken King out of his home and to California without a court order. The expert testified that all reasonable sheriff's deputies know that they are only empowered to enforce their law in their county. (88-A). No reasonable officer would have physically removed a ward from his home and taken him out of his county, much less out of the state, without a specific court order giving him permission. (88-A, 89-A). According to the expert witness, such conduct is not even arguably reasonable. (789-A). Below, Beavers argued that he was acting in his individual or "off-duty"

capacity. However, under clearly established Arkansas case law, an off-duty police officer can still make arrests, even when he is acting under the direction of a private employer. *Myers v. State,* 253 Ark. 38, 484 S.W.2d 334 (1972). In Arkansas, a law-enforcement officer is on duty 24 hours a day, seven days a week. *Id. Myers* had been the law for 23 years prior to this incident, and thus, Beavers should have known that he could not say he was "off duty" and carry King out of his home without proper authority. In any event, qualified immunity does not protect public defendants who claim they have acted as private citizens rather than as public officials. *Rambo v. Dailey,* 68 F.3d 203, 206 (7th Cir. 1995).

Beavers cannot rely on the advice of counsel to show that he acted reasonably in this case. Relying on erroneous opinions from a city attorney and a local judge does not automatically cloak an officer with qualified immunity. *E-Z Mart Stores v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1987). Reliance on counsel is only used to show the reasonableness of the officer's actions. *Id.* In this case, it was unreasonable for Beavers to rely on Bruce Wilson, the county attorney, because Wilson was also the attorney for Marilyn Johnson. Thus, it would have been suspect for Beavers to rely on the advice of Bruce Wilson, who could not give him impartial advice on how to proceed. Beavers also states that he was given the same advice by Sheriff Nicklas, but Sheriff Nicklas never inspected the guardianship order or letters. Furthermore, both Wilson and Nicklas ignored the Arkansas statutes which state that a deputy sheriff only has author-

ity to act within his county. *See,* Ark. Code Ann. §§14-15-503 and 505.

The Eighth Circuit in its opinion below cited Ark. Code Ann. §14-52-203 in support of its holding that Beavers needed qualified immunity because of his broad range of authority. *King,* 148 F.3d at 1036 (10-A).However, the statute cited by the Eighth Circuit refers only to city police officers, not to deputy sheriffs. *See,* Ark. Code Ann. 14-52-203. Furthermore, the Eighth Circuit dismissed Petitioner's expert because, in its view, the expert's testimony did not have anything to do with whether the trip violated King's clearly established constitutional rights. *See, King,* 148 F.3d at 1036 (9-A). That argument seems to miss the point. As argued above, King did have a clearly established federal constitutional right at stake, and the expert was opining on whether or not Beavers' actions were reasonable, not on whether a federal constitutional right was at stake.

For example, in a typical child-visitation case, if a deputy sheriff is asked to enforce an order, he would not take any action until one of the parties produced a writ of assistance. The writ of assistance would command the officer to enforce the order. In other words, simply an order granting visitation rights to one parent would not be sufficient for an officer to go and actually seize the child to give the parent his or her visitation. Similarly, in this case, where an adult without knowledge of any guardianship proceeding is being removed from his home against his will, a writ of as-

sistance or something similar should be required as well.

The Eighth Circuit held that Beavers was "duty bound" to help enforce the order and that, in this situation, he needed to take quick and decisive action. *King,* 148 F.3d at 1036. However, in this case, Beavers spent several minutes trying to talk King into leaving on his own and several minutes speaking with Bruce Wilson and Sheriff Nicklas. King was simply refusing to get out of his bed. There have been no allegations that he took any positive steps to harm anyone. It seems that the only time trouble began was when Beavers tried to remove King from his home. The trauma in this case is that King was told that he would have to leave his home and move halfway across the country without any warning whatsoever. There seems to be little reason to support the notion that King had to be taken to California on that day, other than Johnson's own convenience.

Even though Johnson was from California, there was not a requirement that King go with her back to California. The guardianship statutes provide for the appointment of an agent in the state to receive service. *See,* Ark. Code Ann. §28-65-203(e). Thus, it was contemplated that a guardian might reside out of state whereas the ward would reside in the state.

The breach of peace in this case was caused when Johnson attempted to remove King from his home. The peace was hardly kept when Beavers physically removed King from his bed, out of his

home and into a patrol car, putting King behind the partition as he would a criminal. Beavers had more than sufficient time to think through his actions while he was at King's home and on the drive from Clarksville to Little Rock, approximately one and one-half hours. It never occurred to him to stop. In fact he knew what he was doing and intentionally pursued a course to take King out of the state because he had been promised by Johnson that he would be paid for his time. If the Eighth Circuit holding is allowed to stand, this will only encourage private individuals like Johnson to associate and conspire with public officials such as Beavers to settle their differences. *See, Furrell v. Board of Trustees of Georgia Military College,* 970 F.2d 785, 796 (11th Cir. 1992). Thus, the Eighth Circuit has erred in granting Beavers qualified immunity.

III. The Eighth Circuit has changed the standard for pretrial motions for qualified immunity by accepting as true the facts alleged by the Respondent, not the Petitioner, as it was required to do.

The Court below held that to review the denial of a pretrial qualified immunity motion, it accepts as true the facts alleged by the nonmoving party. *See, King v. Beavers,* 148 F.3d 1031, 1032 (8th Cir. 1998) (citing *Jackson v. Everett,* 140 F.3d 1149, 1151 (8th Cir. 1998)). However, the Eighth Circuit found every fact in a light most favorable to the moving party, Beavers. The court found that King had notice, which he denied. *King,* 148 F.3d at 1032-33. It found that King walked to the patrol

car, when he did not. *Id.* at 1033. Furthermore, King offered affidavits from his brother and sister disputing the alleged "deplorable conditions." All of these facts were significant in that they affect his claim that he was deprived of a federal constitutional right and whether or not Beavers acted reasonably as he is qualified to do under a qualified-immunity analysis. However, the Court of Appeals viewed the facts in a light most favorable to Beavers.

Summary judgment is granted only when there are not genuine issues of fact. Fed. R. Civ. P. 56(c); *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). A court must view the facts and inferences drawn from those facts in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The court below did not follow these rules and instead found the facts in favor of the moving party. This change in the law would make it impossible for any person to bring a claim under 42 U.S.C.A. §1983 against any government official.

CONCLUSION

For the reasons stated, the writ of certiorari should issue to the Petitioner.

Respectfully submitted,

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